St. John's Law Review

Volume 46
Number 3 *Volume 46, March 1972, Number 3*

Article 20

December 2012

Appellate Review--Abuse of Discretion

St. John's Law Review

States,[38] the court found error in not informing him of his ineligibility for parole, and placed the onus on the government of proving the guilty plea to have been voluntary with an understanding of the consequences.[39] Argument by the government that sentence was well within what Bye could have expected even with parole,[40] and that his claim of being unaware of the "consequences" was "incredible"[41] were both dismissed on the weight of *Berry*.[42]

Obviously, underestimation, by a multiple of three, of time to be served is a significant "consequence" within the meaning of Rule 11, regardless of what might be the expectation of a defendant. The attitude of the government appears to have been to prosecute solely for the sake of prosecution itself. But, the court has aligned itself with the majority rule[43] and refused to allow Bye's ignorance of a relatively obscure section of the Internal Revenue Code[44] deprive him of just treatment.[45]

APPELLATE REVIEW — ABUSE OF DISCRETION

On the night of April 20, 1969 Timothy J. Hart, then 18 years old and an honor student in his freshman year at Syracuse University on a full scholarship, was killed in an automobile accident while riding as a passenger in the auto of appellant, Charles N. Forchelli. The action was

---

(1st Cir. 1969); Munich v. United States, 337 F.2d 356, 360-61 (9th Cir. 1964). The court did not find its holding in United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y. 1967), *aff'd sub nom.* United States v. Mauro, 399 F.2d 158 (2d Cir. 1968), *cert. denied*, 394 U.S. 904 (1969), to be inconsistent. In *Mauro*, the record fully rebutted all allegations of unawareness. 280 F. Supp. at 375.

38 412 F.2d 189, 191 (3d Cir. 1969). *See* note 26 *supra*. *Contra*, Smith v. United States, 324 F.2d 436, 440 (D.C. Cir. 1963).

39 The general view among the circuits was that failure to inform defendant of such consequences could constitute harmless error, if it could be established the defendant was aware of the consequences of his plea at the hearing on motion for post conviction relief. 41 TEMP. L.Q. 491, 496 n.26 (1968). However, the Supreme Court, in Mc Carthy v. United States, 394 U.S. 459 (1969), stated that failure to comply with Rule 11 was prejudicial per se. 394 U.S. at 468-72. *See Heiden v. United States*, 353 F.2d 53 (9th Cir. 1965).

40 435 F.2d at 180. The government pointed out that Bye had been informed of a 20 year maximum sentence on each count which, had he received such, and had parole been available, would have made him eligible for parole in 13⅓ years. Since he had received only 15 years total and could conceivably be released afted 10 years with full credit for good time, the government felt "that there was no justification in allowing Bye an opportunity for a shorter incarceration period.

41 The court found it more credible to have a person expect the usual treatment of parole. 345 F.2d at 181, citing, 41 TEMP. L.Q. 491, 496 (1968).

42 Berry v. United States, 412 F.2d 189, 192 (3d Cir. 1969).

43 Cases cited note 25 *supra*.

44 *See* note 33 *supra*. Formerly INT. REV. CODE of 1954, § 7237(d).

45 One might make the argument that Bye should not be entitled to use of his expectation of parole to promote his case for vacating sentence. The government does so argue, and yet attempts to use his expectation of sentence to their advantage. However, such argument tends to obviate the theory of our peno-correctional system, *i.e.*, meaningful rehabilitation.

originally brought by Lucie Dolores Hart, Timothy's mother, as administratrix of goods, chattels and credits of the deceased. The United States District Court for the Eastern District of New York, trying the case before a jury, held the defendant-appellant negligent in an unreported decision and awarded the plaintiff-appellee damages of $252,000. An appeal was sought on the sole issue of whether the damages awarded by the jury were excessive.[46] In a per curiam decision[47] the United States Court of Appeals for the Second Circuit affirmed the findings of the lower court and held that the amount awarded was not so unreasonably excessive as to justify the court's intervention.[48]

The court was faced with the basic question of what is "the scope of review in the appellate courts in examing the excessiveness of a jury verdict."[49] To be sure, the question is neither novel nor easily answered. It has long been held that federal trial courts certainly have the discretion to review a jury verdict in determining whether a new trial should be granted or refused on the grounds of inadequate or excessive judgments.[50] The difficulties are encountered in the consideration of whether an appellate court has the power to review the trial court's grant or refusal of a new trial.[51] The basis of the conflict is rooted in English common law practices[52] and need not concern the reader of this paper. Suffice it to say that there has customarily existed a lack of

---

46 Neither the jury's finding that appellant was negligent nor any other factual determination was contested at the court of appeals' level. Hart v. Forchelli, 445 F.2d 1018 (2d Cir. 1971).

47 *Id.*

48 Some further facts are needed to understand the impact of appellant's contention of excessive damages. At the time of the accident the plaintiff, Mrs. Hart, was forty-one years of age, in excellent health and had a life expectancy of thirty-five years. Some years before the accident she had been abandoned by her husband and had secured employment at the Catholic House of Retreat in Willimantic, Connecticut at a weekly salary of $75. Evidence was produced at the trial that decedent planned to become an attorney and had indicated his intention to support his mother upon completion of his legal education. The realization of this hope was six years in the future at the time Timothy was killed.

49 445 F.2d at 1019.

50 *See* 6A J. MOORE, FEDERAL PRACTICE ¶ 59.08[6], at 3821-822 (2d ed. 1971).

51 For a broad discussion of this much disputed question, *see generally* Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. AM. JUD. SOC'Y 130 (1936); Hinton, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 U. CHI. L. REV. 111 (1953) Comment, *Federal Review of Excessive Verdicts*, 30 TEXAS L. REV. 242 (1951); Note, *Appealibility of Rulings on Motions for New Trial in the Federal Courts*, 98 U. PA. L. REV. 575 (1950); 65 HARV. L. REV. 1064 (1952).

52 Traditionally there are four objections to appellate review. These are: 1) the separation of writ of errors and motion for new trial; 2) prohibitions of the Judiciary Act of 1789; 3) common law review of the verdict and the seventh amendment of the United States Constitution; 4) discretion of the trial court. *See* 6A J. MOORE, *supra* note 50, at 3825-28. Each of these objections is analyzed in its technical ramifications in Comment, *Federal Appellate Review of Excessive or Inadequate Damage Awards*, 28 FORD. L. REV. 500 (1959).

power in appellate courts to review a trial court's order refusing or granting a motion to set aside a verdict on the sole ground that it is excessive or inadequate.[53]

Until quite recently the Second Circuit recognized no power at all existing in a federal appellate court to review the verdict of a jury with respect to damages, be they inadequate or excessive.[54] It is odd that this principle persisted so long in our own federal circuit when the majority of circuits had moved away from it and were in fact allowing a more liberal attitude with respect to the power of appellate courts to review such issues.[55] Most of the circuits which allow review of a lower court's ruling on a motion for new trial based on inadequacy or excessiveness of the verdict, utilize the theory that the trial court judge abused his discretion.[56] This theory has helped many circuits reverse their previous rule of "no-review" and

> the First, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits and the District of Columbia now recognize that they may reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict.[57]

However, so tenaciously had the Second and Eighth Circuits maintained their position that they were termed "the most adamant expounders"[58] of non-reviewability.[59] But the trend away from non-reviewability commenced in 1956, when the Second Circuit moved toward the majority

---

53 *See* 6A J. MOORE ¶ 59.08 at 3825.

54 Certainly the position that there is no power of review is bolstered by a series of cases in the Second Circuit: Maher v. Isthmian Steamship Co., 253 F.2d 414 (2d Cir. 1958); Stevenson v. Hearst Consol. Publications, 214 F.2d 902 (2d Cir. 1954); Kennair v. Mississippi Shipping Co., 197 F.2d 605 (2d Cir. 1952); Nagle v. Isbrandtsen Co., 177 F.2d 163 (2d Cir. 1949); Stornelli v. United States Gypsum Co., 134 F.2d 461 (2d Cir. 1943), *cert. denied.*, 319 U.S. 760 (1943); Powers v. Wilson 110 F.2d 960 (2d Cir. 1940); Searfoss v. Lehigh Valley R. Co., 76 F.2d 762 (2d Cir. 1935); Jacque v. Locke Insulator Corp., 70 F.2d 680 (2d Cir. 1934); Miller v. Maryland Casualty Co., 40 F.2d 463 (2d Cir. 1930); Ford Motor Co. v. Hotel Woodward Co., 271 F.2d 625 (2d Cir. 1921); Press Pub. Co v. Gillette, 229 F. 108 (2d Cir. 1915).

55 *See, e.g.*, Wooley v. Great Atlantic & Pacific Tea Co., 281 F.2d 78 (3d Cir. 1960); Siebrand v. Gossnell, 234 F.2d 81 (9th Cir. 1956); Ballard v. Forbes, 208 F.2d 883 (1st Cir. 1954); Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, Krause v. Bucher, 345 U.S. 997 (1953); Sebring Trucking Co. v. White, 187 F.2d 486 (6th Cir. 1951); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951); Boyle v. Bond, 187 F.2d 362 (D.C. Cir. 1951); Virginia Ry. Co. v. Armentrout, 166 F.2d 400 (4th Cir. 1948).

56 6A J. MOORE at 3836-39.

57 *Id.*

58 *Id.* at 3834.

59 It should be noted here that the Fifth Circuit found rest in neither philosophical camp. It has wavered from a strict view requiring a verdict to be "inordinate" (Crowell-Collier Pub. Co. v. Caldwell, 179 F.2d 941 (5th Cir. 1948)) to the more liberal abuse of discretion theory employed by other circuits (Gleghorn v. Koontz, 178 F.2d 133 (5th Cir. 1948)).

position in the case of *Comisky v. Pennsylvania R.R.*[60] Nevertheless, the court reaffirmed the position that the matter of excessive damages was, as had consistently been held, in the trial judge's discretion. However, the decision showed its wavering in ten words — "though we may review his decision for abuse of discretion."[61] Subsequently, Professor Moore was forced to withdraw his characterization of the Second Circuit as an adamant expounder of non-reviewability. Said Professor Moore, "[t]he Second Circuit left the camp of adamant expounders of non-reviewability in *Dagnello v. Long Island R.R. Co.*"[62] In *Dagnello*[63] the court assumed the abuse of discretion doctrine used by the majority of circuits although it affirmed the lower court's ruling that the damages were not exorbitant.[64]

The Second Circuit had now liberated itself to review the trial judge's decision. Recently, this circuit went to the other extreme and, having ordered the district court to grant the defendant a new trial unless the plaintiff agreed to remit $105,000 of the award,[65] was itself reversed by the United States Supreme Court as having overstepped its bounds.[66] The Supreme Court felt there was no abuse of discretion.[67] It becomes evident that the problem really boils down to what is ex-

---

60 228 F.2d 687 (2d Cir. 1956).

61 *Id.* at 688. A quick reading might have missed this short phrase which merely pointed the way for what was to come. The rigidity of non-reviewability was removed.

62 6A, J. MOORE at 3834 n.57 (Supp. 1970).

63 289 F.2d 797 (1961).

64 The *Dagnello* decision although permitting appellate review does so in a very limited manner. The court held that it had

> the power to review the order of the trial judge refusing to set aside a verdict as excessive. If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.

Id. at 806.

65 Gruenthal v. Long Island R.R. Co., 388 F.2d 480 (2d Cir. 1968), *rev'd*, 393 U.S. 156 (1969). In this case a foreman of a track gang had his right foot severely crushed in a work-related incident. He was awarded $305,000 and when the trial judge refused defendant's motion to set aside the verdict as excessive defendant appealed. The Court of Appeals for the Second Circuit held that the verdict of $305,000 was

> so grossly excessive as to affect the entire case and require a new trial unless Gruenthal agrees within a reasaonable time to remit so much of the recovery as exceeds $200,000 (*i.e.* $105,000). We apply the teaching of Dagnello v. Long Island R.R. 289 F.2d 797 (2d Cir. 1961) and hold, that it would be a denial of justice to permit this verdict to stand.

388 F.2d at 484.

66 393 U.S. 156 (1969).

67 *Id.* at 160.

cessive or as law professors are wont to ask "what is a minute of pain worth?"[68]

In the case of *Hart v. Forchelli*,[69] the Court of Appeals for the Second Circuit looked as objectively as possible at the award of $252,000 which was awarded the plaintiff for the loss of her only son. Despite the fact that the judgment was large,[70] the court felt it was not in the category of a judgment which was so shocking as to constitute an abuse of discretion.[71] Although the Second Circuit did not exercise its power to reverse in *Hart*, it made abundantly clear that such power exists.

Juror's Remark. The court, in *Grace Lines, Inc. v. Motley*,[72] granted a petition for a writ of mandamus ordering the trial court to grant a motion to vacate the order for mistrial.[73] That order was issued on the basis of a juror's remark[74] that she had gone along with the other jurors in order to make the verdict unanimous.[75]

---

68 The question of excessiveness seems to be lost in a sea of superlatives. The standard of what is excessive has received great semantical treatment. To incur appellate interference courts have held the verdict must be "monstrous" (Affolder v. New York, Chicago & St. L. R.R. Co., 339 U.S. 96, 101 (1950)); "palpably and grossly inadequate or excessive" (Dimick v. Schiedt, 293 U.S. 474, 486 (1934)); "fantastic" (La France v. New York, N.H. & H. R.R. Co., 292 F.2d 649, 650 (2d Cir. 1961)); "so grossly excessive as to shock the judicial conscience" (Wooley v. Great Atl. & Pac. Tea Co., 281 F.2d 78, 80 (3d Cir. 1960)); "manifest abuse of discretion" (Russell v. Monongattela Ry. Co., 262 F.2d 349, 352 (3d Cir. 1958)); "shockingly excessive" (Trowbridge v. Abrasive Co. of Philadelphia, 190 F.2d 825, 830 (3d Cir. 1951)); "without precedent or sound legal basis" (Crowell-Collier Pub. Co. v. Caldwell, 170 F.2d 941, 944 (5th Cir. 1948)). This brief exposé of subjective semantics should indicate the imprecision which is inherent in this entire problem of excessiveness.

69 445 F.2d 1018 (2d Cir. 1971).

70 An examination of both New York and federal cases indicated that this was one of the largest awards on record in a wrongful death action with only one surviving relative, who was not the decedent's spouse. Citing Brown v. Louisiana & Arkansas Ry., 429 F.2d 1265 (5th Cir. 1970), the decision also noted that federal juries are not bound by the amount that "New York juries have awarded or New York courts have approved or disapproved." 445 F.2d 1019.

71 To emphasize its contention that the verdict was not excessive the court's opinion broke the award down to a mathematical formula. Since plaintiff had a life expectancy of 35 years at the time of judgement, if the $252,000 award were placed in an interest bearing account at six percent with withdrawals to deplete both interest and principal at the end of her life expectancy the award would amount to $16,500 a year for life. This the court felt was not an amount so excessive as to permit appellate interference.

72 439 F.2d 1028 (2d Cir. 1971).

73 An order granting a new trial is within the trial court's discretion, but the appellate courts may reverse, if there is an abuse of such discretion. *See* FED. R. CIV. P. 61; 6A J. MOORE, FEDERAL PRACTICE ¶ 59.05, at 3756 (2d ed. 1970); 52 AM. JUR. 2d *Mandamus* § 343 (1970).

74 Upon polling the jury, Juror No. 11 replied, "Yes it had to be unanimous." The court asked for an explanation and the juror responded, "The verdict, as I understand, had to be one hundred percent in favor and we had to present one statement. I was, I think the only one that held out and there was no possibility of any change and because of this I did." 439 F.2d at 1030.

75 The right of trial by jury in civil cases over which federal courts have jurisdiction is guaranteed by the seventh amendment. The phrase "trial by jury" has been inter-

The writ was issued on two grounds. First, that since the defendants had made a motion for a directed verdict during the course of the trial, under Rule 50(b) they were entitled to have "the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict" within ten days after the discharge of the jury.[76] Since the defendant was denied such opportunity mandamus will issue to afford it.[77]

The second ground for the ruling was more far-reaching, although the three concurring opinions vary slightly as to the applicability of the principal facts to the precedents involved.[78] The question presented is "whether the motivation of the juror was so unlawful or improper as to require the court to nullify her vote and therefore the entire verdict."[79] The court answered in the negative.

The leading case concerning this question is *McDonald v. Pless*,[80] which established the rule that a juror may not impeach his own verdict.

---

preted to include all the essential elements recognized in jury trials at common law. They are: first, that the jury should consist of twelve men; second, that the jury should be under the superintendence of a judge who will instruct them as to the law; third, that the verdict should be unanimous. *See* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.08, at 84.2 (2d ed. 1971) and cases cited therein. *See also* Patton v. United States, 281 U.S. 276, 288 (1930).

[76] FED. R. CIV. P. 50(b) The motion must be made within ten days after the jury's "discharge" since here the declaration of a mistrial nullified the verdict. But the distinction is only of technical consequence since the moving party is permitted ten days in either case, be it entry of judgment or no verdict.

[77] Generally interlocutory decrees are not appealable because they lack finality. There is some authority for the exception that such decrees are appealable when a jurisdictional question is raised. S.M. Hamilton Coal Co. v. Watts, 232 F. 832 (2d Cir. 1916), *relying on* Phillips v. Negley, 117 U.S. 665 (1886). But in the principal case there was no question raised as to the trial court's power to issue the order.

[78] Judge Anderson and Judge Lumbard agreed that the trial court had abused its discretion in declaring a new trial. Judge Waterman was of the view that such a ruling was unnecessary since the defendant's motion for judgment notwithstanding the verdict had merit. Futhermore, if such a motion was not granted, "the trial judge is cautioned that we have laid down a procedure to be followed when a juror indicates sufficient unsureness to endanger a verdict's validity." Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1034 n.2. Apparently from the use of the word "cautioned" Judge Waterman is implying that the trial judge had not followed such procedure. But he was reluctant to hold with the majority because of the "unusual substitution of our interlocutory discretion for the exercise of the trial judge's discretion." 439 F.2d at 1034. Judge Anderson also makes reference to this procedure but implies that such would be unnecessary in light of the principal facts. *Id.* at 1032.

[79] *Id.* at 1031.

[80] 238 U.S. 264 (1915). The reasoning is based on the practical ground that jury verdicts would become unsatisfactorily mutable. Jury tampering would be given a new field of operation. It should be noted however, that the rule here established is tempered by the dictum that

> it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice.

Id. at 268-69.

However, as the court noted, this does not preclude the juror from stating in open court, before judgment has been entered, that he does not agree with the verdict.[81] But here that rule is inapposite since the juror did not state that she did not agree with the verdict but only stated her reason for concurrence.[82]

Judge Anderson relied principally on *Jorgenson v. York Ice Machine Corp.*[83] where the court stated that

> it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court.[84]

There the jury returned a verdict on the majority view in a 7 to 5 split.[85] Judge Hand went on to state, even if the trial court had in its discretion granted a motion for a new trial, it would not have been sustained.[86]

In *United States v. Grieco*,[87] cited in two opinions, the court reiterated the same sentiments.

> It is not possible to determine mental processes of jurors by the strict tests available in an experiment in physics; we have to deal with human beings, whose opinions are inevitably to some extent subject to emotional controls that are beyond any accessible scrutiny.[88]

A majority of the court was of the view that the juror indicated by her statement that she was not surrendering a conscientious conviction, but merely had conceded that her judgment well might be erroneous in light of the findings of the other eleven and therefore joined their judgment as not an unreasonable one. Thus, the majority held that the trial court "abused its discretion in declaring a mistrial and ordering a new trial."[89] As inferred by Judge Lumbard, to rule otherwise would serve only to facilitate a "needless retrial."

---

81 In such a situation either the jury will be returned for further consideration or will be discharged and a new trial ordered. *See* 6A J. MOORE, FEDERAL PRACTICE ¶ 59.08, at 3796 (2d ed. 1971).

82 439 F.2d at 1031.

83 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

84 *Id.* at 435.

85 The dissenting jurors agreed to accept the vote of the majority in order to expedite the deliberation when it was learned that a juror's son had been killed in action. It is apparent that such facts are far more conducive to declaring the verdict null than in the principal case yet the court emphatically refused to do so.

86 160 F.2d at 435. *See* note 77 *supra.*

87 261 F.2d 414 (2d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959).

88 *Id.* at 415-16.

89 439 F.2d at 1032.